BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia (R. 125-129) is not yet reported.

Jurisdiction

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

Statement of the Case

One Margaret McCathran filed a complaint in the District Court of the United States for the District of Columbia naming as defendants the petitioner District of Columbia, the Sanitary Grocery Company, Inc., a corporation, and the respondents (App. 1). In this complaint the plaintiff McCathran alleged that she sustained personal injuries as the result of tripping and falling over an obstruction or protrusion in the sidewalk or parking adjacent to premises 4801 Georgia Avenue, Northwest, in the District of Columbia, which "obstruction or protrusion was negligently created or installed, maintained or permitted to remain or exist, without proper lighting or warning to pedestrians, by the said defendants, or one or more of them." The petitioner then filed a cross-complaint (App. 5) against respondents and the Sanitary Grocery Company, alleging that either the respondents or the Sanitary Grocery Company paved or caused to be paved the public parking lying between the existing public sidewalk and the buildings; that prior to such paving a water service pipe line

with a stop-cock valve had been installed by one of the predecessors in title of the respondents and that "at the time of the paving of said parking the cross-defendants, or either of them, negligently left or caused to be left the said stop-cock box and cover thereof, abóve the surface of the paved parking, and maintained the said stop-cock box and cover thereof above the surface of the said paved parking * * *."

Plaintiff McCathran testified that on December 31, 1940, she left her place of employment, which was the Chesapeake & Potomac Telephone Company, located at Georgia Avenue and Gallatin Street, at about 8:30 P. M., and walked toward Decatur Street, along the east sidewalk of Georgia Avenue; that she entered the Peoples Drug Store, which was a door or so north of Decatur Street; that after leaving the store she walked toward Decatur Street and stumbled over a water stop-cock box which caused her to fall on her knees (App. 13); that the stop-cock box was in the same condition at the date of the accident as shown in photographs marked plaintiff's Exhibits 1 and 2 (App. 14) and that photographs marked plaintiff's Exhibits 3 to 7, inclusive, show the general condition of the place where she fell (App. 16, 102-105).

One Walsh sold the property here involved to the respondents on June 24, 1930 (App. 39). At the time of this sale, the property was in the condition (App. 41) shown in plaintiff's Exhibits 10, 11 and 12 (App. 106-108). To get into the store one had to take two steps up from Georgia Avenue to the level shown in the exhibits and then another step to get into the store (App. 41). There was a concrete coping 5½ inches high at one end and 6 or 7 inches high at the other end which extended from the steps to the end of the bay window (App. 45). The parking between the sidewalk and building was covered with concrete to the level of the coping (App. 46). The bay window was small (App. 90).

On July 12, 1930 (App. 113), respondents entered into a lease with the Sanitary Grocery Company for the rental of the first floor of the property for a term of five years and in para-

graph 12 of said lease, respondents agreed "to make certain changes, alterations, additions and/or improvements on and to said demised land and premises, in accordance with certain plans and specifications made by George E. Locknane, Architect, and approved by the Lessee in writing thereon" (App. 117), and it was further provided in paragraph 13 that no rent should be charged the lessee until the improvements were fully completed (App. 117). Alterations began in July or August, 1930, (App. 55). The building was remodeled. A seven-room apartment was made out of the second floor (App. 56). The ground floor was lowered between 16 and 20 inches so that there is only one step going in now (App. 48, 56). Before the remodeling there was an areaway between the bay window and the adjoining property, but the bay window was enlarged 3 or 4 feet to the north and there is now no areaway (App. 55). Respondent Vignau told one of the witnesses, Mrs. B. F. Stine, that he was having the place remodeled (App. 56). The Grocery Company moved in in September 1930 (App. 90). After the remodeling, the premises appeared as is shown in the District of Columbia's Exhibit No. 1 (App. 100).

The evidence shows clearly that at the time of the remodeling, the coping and the raised paving were removed between the sidewalk and the building. Witness Boswell testified that he was at respondents' premises on September 2, 1930, while men were working inside the building; that there was dirt between the coping and the building which had been graded out to a level below the sidewalk (App. 20). There is also evidence that the repaving of the parking at the level of the sidewalk occurred subsequent to the laying of the bricks forming the bay window (App. 83).

The witness Walter also testified that at the time of remodeling, the coping was removed, the steps were removed and the sidewalk was beveled up to the door (App. 91).

The witness Walter positively states that at the time of the completion of the work the stop-cock box was elevated above the paving exactly the same as it was at the time of the ac-

cident (App. 92). The witness Johnson testified that a stop-cock box screws up and down; that if it is in dirt you can screw it up and down with ease, but when it is in concrete it cannot be raised or lowered without cutting the concrete (App. 79); that the stop-cock box over which plaintiff McCathran fell was not movable due to the concrete around it and that in order to make it level with the sidewalk he was compelled to break away the top of the stop-cock box (App. 80).

The paving of the parking was done without a permit (App. 57, 59).

The petitioner offered evidence to refute any inference that it might have done the paving. It was shown that the petitioner paves the public parking between the back of the sidewalk and the building line only at the request of the abutting property owners and at their expense and never paves public parking at the expense of the municipality (App. 95) and respondent Alphonse J. Vignau testified that he never made application to the District to pave the parking and that at no time has he paid the District for paving the same (App. 59). It also appears that the paving of the parking was not done by the District because it was not done according to District specifications and was not laid off in 3-foot squares and had no expansion joints as would have been the case had the District done the work (App. 28, 65, 74, 83, 84).

At the conclusion of the testimony offered on behalf of the plaintiff McCathran and the petitioner, the respondents and the Sanitary Grocery Company moved for directed verdicts both on the plaintiff's claim and on the cross-claim, which motions the trial court granted. In granting the motions the trial court said (App. 98):

> "The Court. Gentlemen, the Court hasn't any doubt about the situation here. The Court thinks that all the evidence shows that the District of Columbia adopted the paving as their own for public purposes, and that in so far as anything in the paving that they did not like, if there was anything that

> they did (not) like they could have fixed it. The Court has not the slightest doubt that the District of Columbia is solely responsible for that situation, if there is any responsibility on anybody.
>
> "And the Court grants the motion for a directed verdict for the defendants on the cross claim, and also on the plaintiff's claim."

Pursuant to this direction the jury returned a verdict for the respondents and the Sanitary Grocery Company against the plaintiff McCathran and the petitioner (App. 122). The question of the liability of the petitioner to plaintiff was submitted to the jury, which returned a verdict for the plaintiff McCathran against petitioner in the sum of $3500 (App. 123). Upon all the verdicts judgments were entered (App. 122, 123).

The case was then taken on appeal to the United States Court of Appeals for the District of Columbia, only the respondents being named as appellees. The petitioner contended that the theory upon which the trial justice granted respondents' motion for a directed verdict was wrong and that a municipality held liable to one injured as the result of some defect or obstruction in the public streets had a right of action over against the person guilty of causing or maintaining such defect or obstruction notwithstanding the length of time the defect or obstruction may have existed. The petitioner further contended that there was sufficient evidence to go to the jury on the question whether respondents had created and maintained the obstruction. The respondents, apparently conceding the correctness of the first point, contended that the evidence was not sufficient to sustain a verdict against the respondents. The majority of the Court of Appeals (the decision being rendered on a two to one vote) did not pass upon the questions presented, but raised of its own motion the question of the sufficiency of the cross-complaint. Upon this point the majority, in its opinion, said (R. 127):

"Neither is the District's contention, that appellees are primarily responsible, supported by its own pleadings. In its cross complaint the District alleged—not in the alternative—but equivocally and ambiguously that 'cross-defendants Vignau *or* the cross-defendant, Sanitary Grocery Co., Inc., paved or caused to be paved the public parking lying between the existing public sidewalk and said building, without first having obtained a permit from this defendant so to do; * * * that at the time of the paving of said parking the cross-defendants, *or* either of them, negligently left or caused to be left the said stop-cock box and cover thereof, above the surface of the paved parking, and maintained the said stop-cock box and cover thereof above the surface of the said paved parking, in violation of the following plumbing, water, police and other regulations * * *. And cross-plaintiff says that if the injuries plaintiff alleges she sustained were due to *the failure of the cross-defendants, or* either of them, to comply with said regulations, or to negligence on the part of said cross-defendants, *or either of them* in failing to keep and maintain the said water stop-cock box of said premises in good repair and position, and if said plaintiff recovers a judgment in this cause against the defendant and cross-plaintiff, District of Columbia, because of the accident and injuries set forth in the complaint, this cross-plaintiff will be entitled to recover said damages against said defendants, Vignau, *or* said Sanitary Grocery Co., Inc., *or* either of them *or* all of them. WHEREFORE, the cross-plaintiff, District of Columbia, demands judgment against the cross-defendants, Vignau, *or* against the cross-defendant, Sanitary Grocery Co., Inc., *or* against all of said cross-defendants, for such sums as it may be condemned to pay as damages to the plaintiff, together with costs.' (Italics supplied.) *

"Upon this pleading the District chose to stand throughout the trial. There was no election upon its part as between *three* mutually inconsistent propositions pleaded therein: (1) That appellees alone were

* The italics were supplied by the court.

primarily responsible; (2) that the Sanitary Company alone was primarily responsible; (3) that appellees and the Sanitary Company were jointly responsible. There was no motion to amend or conform the pleadings to the proof. Only when the District chose to appeal from the judgment of the trial court did it elect to hold appellees alone. But this election comes too late to escape the effect of the rule; because that rule operates at the trial court level; specifically, at the point where the trial judge applied it in directing a verdict—as a matter of law—against the District. At that point there were *four* inconsistent propositions in issue: The three stated above and the fourth, namely, that the District alone was responsible for installing and maintaining the obstruction. The trial judge was satisfied that no one of the three pleaded by the District had been sustained by the evidence. The jury was satisfied that the fourth had been sustained, by the evidence, against the District. We are asked now to say, in the face of all this, that the evidence clearly established another one of the four propositions; namely, that appellees *alone* were responsible for creating the obstruction. This we are unable to do. While there was some evidence tending in that direction; while there would have been, perhaps, enough evidence to take the case to the jury if only one of the four propositions had been in issue, under the rule applicable in such a situation; that is not the situation of the present case, and an entirely different rule is applicable here. The record fails to show that the District maintained its burden. Consequently, the trial court properly directed a verdict in favor of appellees."

In the minority opinion it is said (R. 128):

"I see nothing in the pleadings which should prevent us from enforcing the District's right to indemnity."

A petition for rehearing was denied. (R. 131.)

Specification of Errors

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the petitioner's cross-complaint was equivocal and ambiguous and required amendment before the question of respondents' liability to petitioner could be submitted to the jury.

2. In holding that the verdict of the jury in favor of the plaintiff McCathran and against petitioner established the proposition that the petitioner alone was responsible for installing and maintaining the obstruction and was not entitled to maintain an action over against respondents.

3. In not holding that the evidence was sufficient to go to the jury on the question of respondents' liability to petitioner.

4. In not reversing the judgment of the District Court of the United States for the District of Columbia.

Federal Rules of Civil Procedure Involved

Rule 8(e) of Federal Rules of Civil Procedure provides, in part, as follows:

> "(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11."

Rule 20(a) of said Rules provides as follows:

"(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Rule 84 provides:

"RULE 84. FORMS. The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate."

Form 10 in the Appendix of Forms provides:

"FORM. 10.—COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

A. B., Plaintiff	
v.	Complaint
C. D. and E. F., Defendants	

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ten thousand dollars and costs."

Summary of Argument

Under Rules 8(e) and 20(a) of the Federal Rules of Civil Procedure, it is proper to allege that either of two defendants, or both, was or were guilty of negligence which caused the injuries. Nowhere is there any intimation that a pleading drawn in conformity with the rules and the forms must be amended because the evidence fails to support one of two claims against a single party or a claim against one of two parties. If there is any doubt, and we submit there is none, as to the meaning of these rules, such doubt is removed by a reference to Form 10 in the Appendix of Forms, which gives as proper the allegation that "defendant C. D. or defendant E. F., or both defendants C. D. and E. F." was or were guilty of negligence. Circuit Courts of Appeals generally have sustained pleadings drawn in accordance with the forms prescribed in the Appendix of Forms.

It is well settled law in the District of Columbia that, where a person negligently or unlawfully creates or maintains an obstruction or defect in the streets of the District and the municipality has notice, either actual or constructive, of the existence of such defect, and has negligently failed to remove or repair the

same, both such person and the municipality are liable in damages to any one injured as the result of such obstruction or defect. It is equally well settled that, where the District of Columbia has been compelled to respond in damages as a result of a defect in a street caused or maintained by another, the municipality has a right of action over against the person causing the defect. The majority of the Court of Appeals in holding that the finding of the jury that petitioner was liable to plaintiff McCathran established that the petitioner was solely responsible for creating and maintaining the defect, and, therefore, was precluded from maintaining an action over against respondents, is contrary to the decision of this Court in Washington Gaslight Company v. District of Columbia, 161 U. S. 316. The sole issue between the plaintiff McCathran and the petitioner was whether the District failed to perform its duty to use reasonable care to keep its streets in a reasonably safe condition. The question whether respondents created the condition and the question whether there was a primary duty on respondents to maintain the stop-cock box in a safe condition were not before the jury.

There was sufficient evidence to go to the jury on the questions whether respondents created the condition and whether it was their primary duty to keep the stop-cock box in a safe condition. The minority of the Court was of this opinion. The majority did not expressly pass upon this question, but did imply that the evidence was sufficient and that the District would have been entitled to go to the jury had it amended its cross-complaint, as the Court held petitioner was required to do.

Argument

I

The cross-complaint was sufficient under the Federal Rules of Civil Procedure and required no amendment to sustain a judgment against respondents.

The majority opinion of the Court of Appeals held that the petitioner was not entitled to recover over against the

respondents for the reason that the cross-complaint alleged three propositions; first, that respondents created and maintained the dangerous condition; second, that the Sanitary Grocery Company created and maintained the condition; and, third, that both did it. This the majority of the Court held was pleading "equivocally and ambiguously." The majority of the Court further held that, if the evidence disclosed that the respondents alone had created the dangerous obstruction and that it was their primary duty to maintain the stop-cock box in a safe condition, the petitioner was required to make an election and amend its cross-complaint so as to allege solely the negligence of respondents. This ruling is contrary to the plain provisions of the Federal Rules of Civil Procedure. Paragraph 2 of Rule 8(e) specifically provides that claims and defenses may be set forth "alternatively" and that "When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." Rule 20(a) provides that "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief" and that "Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities." Nowhere is there any intimation that a pleading drawn in conformity with the rules must be amended because the evidence fails to support one of two claims against a single party or a claim against one of two parties. If there is any doubt, and we submit there is none, as to the meaning of these rules, such doubt is removed by a reference to Form 10, which gives as proper the allegation that "defendant C. D. or defendant E. F., or both defendants C. D. and E. F." was or were guilty of negligence. It will be observed from the heading at the beginning of the form that it is to be used when a plaintiff is unable to determine definitely whether his injuries resulted from the negligence of

one or two persons, or both. There is no indication that one using this form is required to amend his pleading or make an election before he is authorized to recover against one defendant only. The cross-complaint in this case, which the majority of the Court of Appeals characterizes as "equivocal and ambiguous", follows in substance the form prescribed by this Court. Circuit courts of appeals generally have sustained pleadings drawn in accordance with the forms prescribed in the Appendix of Forms.

Sierocinski v. *E. I. DuPont DeNemours & Co.*, (C. C. A. 3d Cir.), 103 F. (2) 843,
Swift & Company v. *Young*, (C. C. A. 4th Cir.), 107 F. (2) 170,
Sparks v. *England*, (C. C. A. 8th Cir.), 113 F. (2) 579,
Ramsouer v. *Midland Valley R. Co.*, (C. C. A. 8th Cir.), 135 F. (2) 101.

See also:

Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Court of the United States prepared by the Advisory Committee on Rules for Civil Procedure (May 1944), p. 118.

If a litigant cannot with safety follow a form which this Court has appended to the Rules of Civil Procedure, the form is more than worthless. It actually becomes a trap. Certainly this was not intended by this Court as is evidenced by Rule 84. We submit that a litigant following Form 10 prescribed by this Court is not required to amend his complaint merely because his evidence fails as against one of the parties. The effect of the majority decision of the Court of Appeals is to abrogate the rules above referred to.

II

A person negligently or unlawfully creating or maintaining an obstruction or a defect in a public street impliedly contracts to indemnify the municipality against any loss it may sustain by reason of such defect.

It is settled law in the District of Columbia that, where a person negligently or unlawfully creates or maintains an obstruction or a defect in the streets of the District of Columbia, and the municipality has notice, either actual or constructive, of the existence of such defect, and has negligently failed to remove or repair the same, both such person and the municipality are liable in damages to any one injured as the result of such obstruction or defect.

The municipality is liable because it has failed to fulfill its duty to use reasonable care to keep its streets in a reasonably safe condition.

> *Washington Gaslight Company* v. *District of Columbia,* 161 U. S. 316,
> *Way* v. *Efdimis,* 66 App. D. C., 92, 85 F. (2) 258.

The person creating or maintaining the obstruction or defect is also liable to the person injured because it was the act of the former, either of commission or omission, which caused the injury.

> *Way* v. *Efdimis,* supra,
> *Security Savings & Commercial Bank* v. *Sullivan,* 49 App. D. C. 119, 261 F. 461.

It is equally well settled that, where the District of Columbia has been compelled to respond in damages as a result of a defect in a street caused or maintained by another, the municipality has a right of action over against the person causing the defect. In other words, the parties are not in *pari delicto* and the law implies a contract on the part of the person caus-

ing the defect to indemnify the municipality against any loss it may sustain by reason of such defect. *Washington Gaslight Company* v. *District of Columbia,* supra.

The majority opinion of the Court of Appeals in this case proceeds upon the theory that the jury in finding against the petitioner and in favor of the original plaintiff McCathran found that the petitioner *alone* was responsible for installing and maintaining the obstruction. Upon this point the majority opinion says (R. 128):

> "At that point there were *four* inconsistent propositions in issue: The three stated above and the fourth, namely, that the District alone was responsible for installing and maintaining the obstruction. * * * The jury was satisfied that the fourth had been sustained, by the evidence, against the District."

We submit there was no such issue before the jury as between the original plaintiff and the petitioner. The question of respondents' liability to the plaintiff McCathran was not submitted to the jury. This is not a case where the establishment of the liability of one defendant necessarily negatives the liability of another. A municipality is liable for a defective condition in its street which it has negligently failed to remove, even though the defective condition may have resulted from the affirmative act of another or from the negligence of one to maintain in a safe condition some appurtenance in the public street which it was the primary duty of such person to maintain. In such case, the municipality, though liable to the person injured, would have a right of action over against the person creating or maintaining the defective condition. The original plaintiff here offered no proof that the petitioner had created the condition. As against the petitioner, she contented herself with showing the existence of the defective condition for an unreasonable length of time, which was sufficient to support a verdict in her favor and was consistent with one of the theories of the original complaint which

alleged, (App. 2) that "said obstruction or protrusion was negligently created or installed, maintained or permitted to remain or exist, without proper lighting or warning to pedestrians, by the said defendants, or one or more of them, * * *." Even the trial judge in granting the motions of the respondents and the Sanitary Grocery Company for directed verdicts as against the original plaintiff and the petitioner did not find that the petitioner created the condition. Upon that point, the trial court said (App. 98):

> "The Court thinks that all the evidence shows that the District of Columbia adopted the paving as their own for public purposes, and that in so far as anything in the paving that they did not like, if there was anything that they did (not) like they could have fixed it.'"

This clearly shows that the Court regarded the evidence as establishing the fact that the paving was not done by the District. The action of the trial court was upon the theory that the District had adopted the paving, though, as hereinafter pointed out, there is not one word in the testimony to support that conclusion.

The majority of the Court of Appeals, in holding that a judgment obtained against the petitioner by one sustaining injuries from a defect in a street establishes the fact that the petitioner alone was responsible therefor and is, therefore, not entitled to raise the question in an action over against a third party as to whether such third party caused or maintained the defect, is contrary to the decision of this Court in *Washington Gaslight Company* v. *District of Columbia*, 161 U. S. 316. In that case the Gaslight Company had properly installed a stop-cock box in the public sidewalk. This box became defective through neglect and a person was injured by stepping into it. The injured person sued the District of Columbia and recovered a judgment. The District thereupon brought an action against the Gaslight Company for in-

demnity. In stating the question involved in this case, this Court said:

> *"Second. Had the District a cause of action against the Gas Company resulting from the fact that it had been condemned to pay damages occasioned by the defective gas box, which it was the duty of the Gas Company to supervise and repair?"*

This question this Court answered in the affirmative.

III

There was sufficient evidence from which the jury could have inferred that respondents created the dangerous condition.

In the Court below counsel for respondents made the sole contention that, in this case, the evidence tended in no greater degree to show that respondents had created the dangerous condition than that either the Sanitary Grocery Company or petitioner had created it, and that, "when the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." We did not then, and do not now, question this statement of the law as an abstract proposition, but we do contend that it has no application in this case. The undisputed evidence was that the petitioner did not pave the parking. There is no evidence from which it could be inferred the Sanitary Grocery Company did it. The only fair inference from the testimony is that the paving was done by respondents and it is also undisputed that the water stop-cock box was left projecting above the paving when the paving was completed. It is undisputed that respondents purchased the property on June 24, 1930; that on July 12, 1930, respondents entered into a five-year lease with the Sanitary Grocery Company in which lease respondents agreed to make certain alterations in the building and to charge the lessee no rent until the improve-

ments were fully completed. The alterations were started in July or August, 1930, and the building was remodeled, a seven-room apartment being made out of the second floor. The ground floor of the building was lowered between 16 and 20 inches and the bay window was enlarged, which necessitated the removal of the coping in which the stop-cock box was installed and the lowering of the grade of the parking to the grade of the sidewalk. The coping was removed and the parking repaved. It is too incredible to believe that, if respondents, under the terms of their lease, were required, as they were, to make alterations in the portion of the premises leased to the Sanitary Grocery Company, that company would make the improvements outside the leased portion of the building. The laying of, at least, a lead from the sidewalk to the step was necessary to give access to the store. It appears from the evidence that all of the parking was paved at the same time. (App. 83.)

It is true that there is no direct evidence that respondents paved the parking, but it is not necessary that all the elements of a case be proved by direct and positive testimony. A fact may be proved by circumstantial evidence provided a reasonable inference may be drawn from such evidence, and there is no requirement of law that the circumstances to justify the inference sought must negative every other positive or possible conclusion.

In the case of *Tennant* v. *Peoria and Pekin Union Ry. Co.*, 321 U. S. 29, an employee of a railroad had been killed. No direct evidence was offered as to the cause of his death. There was some evidence from which the jury could infer that the deceased came to his death as the result of some act for which the railroad company was responsible. The jury so found. But on appeal to the Circuit Court of Appeals the judgment was reversed on the ground that the jury could also have inferred that the deceased came to his death through causes for which the railroad company was not responsible. In reversing the Circuit Court of Appeals, this Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co.,* supra, 68; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

And in the case of *Christie* v. *Callahan,* 75 U. S. App. D. C. 133, 147, 124 F. (2) 825, the Court said:

> "Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inferences drawn must be reasonable. But there is no requirement that the circumstances, to justify the inferences sought, negative every other positive or possible conclusion."

In this case, as before stated, there was positive evidence that respondents were remodeling their building in such a manner as to require the removal of the coping and the repaving of the parking. Therefore, it is not only a reasonable inference that respondents did pave the parking, but, we sub-

mit, it is the only fair inference to be deduced from the proven facts.

Whether respondents did or did not pave the parking is a matter peculiarly within their knowledge. They did not deny they paved it. Under these circumstances the presumption is strongly against them. *Moore* v. *McDonald,* 122 Cal. App. 61, 9 P. (2) 556.

In the minority opinion of the Court of Appeals, it is said:

> "In my opinion the evidence made it probable, and would therefore have supported a finding, that appellees created the dangerous condition."

While the majority of the Court did not pass directly upon this question, in their opinion it is said:

> "We are asked now to say, in the face of all this, that the evidence clearly established another one of the four propositions; namely, that appellees *alone* were responsible for creating the obstruction. This we are unable to do. While there was some evidence tending in that direction; while there would have been, perhaps, enough evidence to take the case to the jury if only one of the four propositions had been in issue, under the rule applicable in such a situation; that is not the situation of the present case and an entirely different rule is applicable here."

It is thus apparent that even the majority would have held, except for their erroneous view that the pleadings must be amended to present a single issue, that there was sufficient evidence to go to the jury on the issue whether respondents created the dangerous condition. We submit that, as between the petitioner and respondents, there was but this single issue, and that the petitioner was entitled to go to the jury thereon.

There is nothing in the record to show that the petitioner had "adopted the paving as its own for public purposes", as held by the trial justice. It does not appear that the peti-

tioner had actual notice of the paving by respondents. The respondents did the work without a permit (App. 57, 59). It was not done for the benefit of the petitioner. The sidewalk on Georgia Avenue had been paved for many years (App. 94). The District never paves the public parking at public expense and the paving of the parking by respondents did not relieve the District of doing work it otherwise would have done. Obviously, respondents paved the parking for their own benefit to make their show window more accessible to the public.

IV

There was evidence to go to the jury on the theory that the paving of the parking and the installation of the stop-cock box were for the benefit of respondents.

There was evidence (App. 60) that the installation of the water stop-cock box was for the benefit of respondents. In any event, the paving of the parking was for their benefit. These, then, constituted appurtenances to respondents' property which it was the primary duty of respondents to maintain in a safe condition, whether respondents installed them or not, and not the duty of the Sanitary Grocery Company, the lessee of the first floor. *Security Savings & Commercial Bank* v. *Sullivan,* 49 App. D. C. 119, 261 F. 461. This being respondents' duty, they are the ones primarily responsible for any loss resulting from the defective condition and the petitioner has an action over against them.

> *Washington Gaslight Company* v. *District of Columbia,* supra.

This contention was sustained by the opinion of the minority of the Court below, as follows:

> "In my opinion the evidence made it probable, and would therefore have supported a finding, that appellees created the dangerous condition. Moreover I

think it immaterial whether they or Sanitary created it, and I find no evidence that the District created it. I think the owner and not the District is primarily liable for injuries caused by lack of reasonable care to maintain in safe condition the space between a public sidewalk and a building. In other words the District, though liable to the person injured, is entitled to indemnification from the property owner. The owner rather than the District derives benefit from this space, and the owner has more opportunity than the District to know what conditions exist there and to exercise judgment as to whether they are dangerous. I see nothing in the pleadings which should prevent us from enforcing the District's right to indemnity."

Conclusion

In view of the foregoing, it is respectfully submitted that the United States Court of Appeals for the District of Columbia in its decision in this case has failed to follow the Federal Rules of Civil Procedure and is in conflict with the decisions of Circuit Courts of Appeals and also has not given proper effect to applicable decisions of this Court; that a writ of certiorari should be granted, and that this Court should review the decision of said United States Court of Appeals of the District of Columbia and finally reverse said decision.

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